claim, but reversed the dismissal of the First Amendment retaliatory prosecution claim. *Id.* at 12a-24a.

The court noted that "plaintiffs must establish three elements in order to make out a retaliation claim." *Id.* at 18a. Plaintiffs must establish first, that "they were engaged in constitutionally protected activity"; second, that "defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and third, that "the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Id.* quoting *Keenan* v. *Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The court then noted that the Fifth Circuit also requires plaintiffs to establish the common-law elements of malicious prosecution, including lack of probable cause. *Id.*

The court stated that although "the government need not have even reasonable suspicion to undertake an investigation . . . this is beside the point." *Id.* at 18a-19a "Izen's claim, properly understood, is not that Catalina violated the First Amendment by undertaking an investigation without reasonable suspicion, but rather that he violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against Izen for his advocacy on behalf of unpopular criminal tax defendants." *Id.* at 19a. The court went on to hold that Petitioner's claim was clearly established and that Respondent was not entitled to qualified immunity. *Id.* at 24a ("A reasonable agent would not have believed it permissible to investigate and prosecute an attorney in order to discourage him from opposing the IRS.").

Five months later, the Fifth Circuit entered a second opinion on panel rehearing. In its revised opinion, the court eliminated its lengthy recitation of the lack of any evidence that Respondent had engaged in money laundering. Instead, the court presented a list of facts

provided by the "unreliable informant" which, along with innocuous information about Petitioner's "knowledge about offshore banking," Nassau Insurance, and association with a single individual, purportedly constituted "verifiable, independent information concerning Izen's questionable activities that amounted to probable cause." *Compare* App., *infra*, 20a-23a *with id.* at 9a-10a. The court went on to conclude that the evidence gathered by Respondent and the grand jury "demonstrates probable cause as a matter of law." Consequently, the court held that "because [Petitioner] is unable to create a triable issue of fact as to whether probable cause existed when he was indicted, the district court thus properly granted summary judgment to Catalina on the retaliation claim." *Id.* at 11a.

The Fifth Circuit's opinion on rehearing thus turned on its new finding that Petitioner could not establish lack of probable cause. Were it not for the Fifth Circuit's requirement that a retaliatory prosecution plaintiff must show lack of probable cause, the grant of summary judgment to Respondent would have been reversed.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Fifth Circuit Conflicts With That Of Three Other Circuits.

The Fifth Circuit's opinion in this case expressly recognizes the split among the circuits on whether a *Bivens* plaintiff must prove absence of probable cause to maintain a First Amendment Retaliation claim.[1] App.,

---

[1] A cause of action for deprivation of constitutional rights against federal officers under *Bivens* is analogous to a similar action against state officers under 42 U.S.C. § 1983, and therefore the standards applicable to cases decided under § 1983 apply equally to *Bivens* actions, and vice versa. *E.g.*, (...continued)

infra, 8a n.7. Three circuits hold, in conflict with the holding below, that probable cause does not decide the question of whether a governmental official retaliated against a *Bivens* plaintiff in order to chill the exercise of constitutionally protected rights. On the other hand, three circuits agree with the Fifth, that a plaintiff alleging retaliatory prosecution must prove lack of probable cause in order to prevail.

The circuit split described in the Fifth Circuit's opinion warrants review by this Court. Seven circuits have spoken definitively on the issue, including two within the last year. Indeed, the Court has already granted certiorari to decide this issue in *Hartman* v. *Moore*.

A. The Sixth, Tenth, and District of Columbia Circuits Do Not Require Absence Of Probable Cause To Maintain A First Amendment Retaliation Claim.

Three circuits have held that absence of probable cause is not properly an element of a First Amendment retaliation claim.

Most recently, the District of Columbia Circuit held that "the clearly established law of [the D.C.] circuit barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so." *Moore* v. *Hartman*, 388 F.3d 871, 873 (D.C. Cir. 2004), *cert. granted*, *Hartman* v. *Moore*, No. 04-1475, 554 U.S. ___ (June 27, 2005). In *Moore*, the plaintiff was indicted in connection with a kickback scheme involving postal officials, but the district court dismissed the case due to "a

---

Butz v. *Economou*, 438 U.S. 478, 500-01 (1978). Accordingly, this Petition discusses both *Bivens* and § 1983 actions.

complete lack of direct evidence to suggest the Defendants knew of the illegal payoff scheme." 388 F.3d at 874 (quotation marks omitted). As here, the plaintiff sought damages for retaliatory prosecution under *Bivens*, but the defendants argued that the existence of probable cause should defeat the claim. *Id.* at 877.

The D.C. Circuit disagreed. The court applied its precedent, *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987), which states that the "essential elements" of a retaliatory prosecution claim are: 1) that "the conduct allegedly retaliated against or sought to be deterred was constitutionally protected"; and 2) that the "prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." 388 F.3d 877-78. If the plaintiff meets his burden on both issues, the defendant must then show that "the same decision as to whether to prosecute" would have been made "even had the impermissible purpose not been considered." *Id.* (quoting *Haynesworth*, 830 F.2d at 1257 n.93. *Haynesworth* did not "suggest that lack of probable cause is an element of the claim, nor does its silence imply such a requirement." *Id.* "[O]nce a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 878. The court noted that probable cause "usually represents only one factor among many in the decision to prosecute." Therefore, "there is no reason to expect that the mere existence of probable cause will suffice" to allow government officials to escape liability. *Id.*

The court further noted that its holding is supported by this Court's holding in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). *Id.* at 879. As in *Mt. Healthy*, if the plaintiff could show his constitutionally protected activity was a "motivating factor" in the defendant's decision, the burden would shift to defendant to show "it would have

reached the same decision even in the absence of the protected conduct." *Id.* (quoting *Mt. Healthy*, 429 U.S. at 287).

Like the D.C. Circuit, the Sixth Circuit has held that probable cause does not necessarily negate a retaliatory prosecution claim. In *Greene* v. *Barber*, plaintiff was arrested after making disparaging remarks to a police officer. 310 F.3d 889, 892 (6th Cir. 2002). The Sixth Circuit held that "a respectable argument can be made" that the officer had probable cause to believe that plaintiff was violating the law. The court further stated: "however, the existence of probable cause is not determinative of the constitutional question if, as alleged here, the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech." *Id.* at 894. "The law is well established that 'an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason would have been proper.'" *Id.* (quoting *Bloch* v. *Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998).

The Tenth Circuit has similarly held that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (quoting *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)). In *Poole*, the plaintiff was charged with careless driving after speeding through Alamogordo, New Mexico. *Id.* at 958. Poole's lawyer wrote to the defendant county, requesting that it preserve evidence of the incident. *Id.* Soon thereafter, the county withdrew the careless driving charge and filed a new complaint charging Poole with six counts of reckless driving, along with resisting and evading arrest. *Id.* Poole brought suit, alleging that his lawyer's letter was notice that Poole might file a civil suit against the county, and that the

county increased the charges against him in an attempt to stifle his First Amendment right to bring such a suit. *Id.* at 961. The county responded that Poole's behavior justified the stiffer charges. *Id.* The Tenth Circuit held, however, that "[t]he propriety of charging Mr. Poole in light of his conduct during the pursuit is not relevant to his First Amendment claim." *Id.*

Three circuits thus hold that probable cause is irrelevant to a claim of retaliatory prosecution under the First Amendment.[2] If Petitioner's suit arose in the Sixth, Tenth, or District of Columbia Circuits, his claim would have gone forward. Instead, Petitioner's claim was dismissed based solely on a finding that there was probable cause to investigate him. App., *infra*, 11a.

B. The Second, Fifth, Eighth, and Eleventh Circuits Require Plaintiff To Prove Lack of Probable Cause.

Four circuits have taken the contrary position that probable cause is a complete defense to a retaliatory prosecution claim. The Fifth Circuit requires probable cause because it is an element of the common law tort of malicious prosecution. Other circuits have simply found that a showing of probable cause defeats a retaliation claim.

In the Fifth Circuit's opinion on rehearing below, the court held that plaintiffs alleging retaliatory prosecution must establish "each of the common law

---

[2] The Fifth Circuit's opinion asserts that the Seventh Circuit also does not require proof of the lack of probable cause. App., *infra*, 8a n.7. However, the Seventh Circuit has thus far declined to decide the question. *See Abrams* v. *Walker*, 307 F.3d 650, 657 (7th Cir. 2002) (declining to rule on whether "probable cause is a complete defense to a First Amendment retaliation claim in the context of an arrest").

elements of malicious prosecution." App., *infra*, 7a. One of these elements is "an absence of probable cause to prosecute." *Id.*, quoting *Keenan* v. *Tejeda*, 290 F.3d 252 (5th Cir. 2002).

Other circuits do not base the requirement of lack of probable cause on the common law elements of malicious prosecution. For instance, the Second Circuit held, in *Mozzochi* v. *Borden*, 959 F.2d 1174 (2d Cir. 1992), that if probable cause exists "independent of the defendants' motive . . . the defendants' motive need not be examined." *Id.* at 1180. *Mozzochi* involved a plaintiff who had sent a series of critical letters to his Town Manager and members of the Town Council. *Id.* at 1175-76. When plaintiff mailed a newspaper clipping about a disgruntled citizen who had murdered the mayor of an Iowa city, he was prosecuted for criminal harassment. *Id.* at 1176. The prosecutor offered to drop the charges in exchange for a release of civil claims, but the plaintiff refused. *Id.* The prosecutor then dropped the charges before the trial was complete. *Id.* In the plaintiff's retaliatory prosecution suit, the Second Circuit held that the plaintiff could not sustain a claim for retaliation if the criminal prosecution was supported by probable cause because "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Id.* at 1180. The Second Circuit found it significant that the plaintiff was not actually chilled, in that he continued his criticism of the public officials despite the prosecution. *Id.*

The Eighth Circuit has also held that probable cause can defeat a claim of retaliatory prosecution. In *Smithson* v. *Aldrich*, 235 F.3d 1058 (8th Cir. 2000), plaintiff, an owner of a bar, challenged his arrest for violating a noise ordinance, stating that the arrest was a pretext for the police officers' disagreement with

statements he made to concert attendees. The Eighth Circuit held that the police officers were necessarily entitled to qualified immunity because the arrest was justified by probable cause and therefore objectively reasonable even if plaintiff could prove the officers intended to retaliate against him for his statements. *Id.* at 1063.

Finally, the Eleventh Circuit also holds that the existence of probable cause bars a First Amendment retaliation claim. *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("[T]he existence of probable cause to arrest [plaintiff] defeats her First Amendment claim" that she was arrested in retaliation for her constitutionally protected speech.).[3]

These four circuits thus directly conflict with the Sixth, Tenth, and District of Columbia Circuits on the Question Presented. Only this Court can resolve the

---

[3] Contrary to the Fifth Circuit's assertion, App., *infra*, 8a n.7, the Third Circuit does not hold that probable cause bars a First Amendment retaliation claim. In *Merkle* v. *Upper Dublin School District*, 211 F.3d 782 (3d Cir. 2000), the Third Circuit reversed summary judgment in favor of school officials that had pursued theft charges against a teacher who attempted to donate surplus art supplies. The court held that the question of whether defendants' actions were retaliatory is "influenced by the strength of [plaintiff's] claim against them for common law malicious prosecution." *Id.* at 794. However, lack of probable cause is only one element of the common law tort of malicious prosecution. *See, e.g.*, App. *infra*, 32a. In *Merkle*, the court determined that the school officials did not have probable cause to believe the plaintiff had committed theft. *Id.* at 795. The court thus did not have occasion to determine whether the existence of probable cause would "influence" the retaliation question so as to necessarily defeat a claim of retaliatory prosecution under the First Amendment. *Cf. Moore*, 388 F.3d 878 ("[P]robable cause usually represents only one factor among many in the decision to prosecute.").

disagreement among the circuits and bring uniformity to this important area of the law.

II. Probable Cause Is Not A Proper Element Of A First Amendment Retaliation Claim.

A straightforward application of this Court's precedents requires that a plaintiff alleging First Amendment Retaliation need not prove the absence of probable cause. The Court's decision in *Mt. Healthy* adopts the burden-shifting approach applied by the D.C. Circuit in *Moore*. Further, the Court has rejected the approach that unconstitutional retaliation claims are defeated based solely on objective validity, regardless of improper intent. The Sixth, Tenth, and D.C. Circuits are thus correct to hold that probable cause does not defeat a claim of retaliation under the First Amendment. Those circuits that hold otherwise have erroneously conflated the common law requirements of malicious prosecution with those of First Amendment retaliation, or have failed to articulate any basis at all for their holdings.

In *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), this Court established that government actors who retaliate against the exercise First Amendment rights may be sued even if the action in question would have been proper if it were taken for a different purpose. *Mt. Healthy* concerned a high-school teacher who was discharged in part for statements made on a radio program. Although the teacher could have been terminated for any reason or no reason at all, the Court held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.* at 283-84. The Court adopted a burden-shifting analysis for retaliation claims. *Id.* at 287. First, the plaintiff has the burden "to show that his conduct was

constitutionally protected." *Id.* Second, he must show that the conduct was a "substantial" or "motivating" factor in the adverse action. *Id.* The burden then shifts to defendant, who must show "that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* This general rule applies to retaliatory prosecutions. *See Wayte* v. *United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard . . . including the exercise of protected . . . constitutional rights.") (marks and citations omitted).

The D.C. Circuit was thus correct adopt this same balancing test to the question of retaliatory prosecutions. *Haynesworth*, 820 F.2d at 1257. The result is "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286. The alternative, adopted by the Fifth Circuit below, allows a result caused by a constitutional violation to stand so long as probable cause is present.

The Court has already rejected the proposition that retaliation claims are defeated based solely on objective validity, regardless of improper intent. In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), a prisoner claimed that a prison official had misdirected the prisoner's personal belongings in retaliation for the prisoner's exercise of his First Amendment rights. The D.C. Circuit held that such a claim was subject to a heightened pleading standard, but this Court declined to adopt that view. 523 U.S. at 601. The Court held that a government official defending against a retaliation claim is not entitled to qualified immunity simply because the official's conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 593 (citing *Mt. Healthy*).

The Court rejected the proposition advanced in dissent that "once the trial court finds that the asserted

grounds for the official action were objectively valid . . . it would not admit any proof that something other than those reasonable grounds was the genuine motive." *Id.* at 612 (Scalia, J., dissenting).[4] Thus, the Fifth Circuit is incorrect to allow an objective showing of probable cause to defeat a retaliation claim regardless of improper retaliatory intent.

The lower court decisions holding that a showing of probable cause defeats a First Amendment retaliation claim are unpersuasive. By and large, these decisions either assert that a plaintiff claiming retaliatory prosecution must also show the elements of common law malicious prosecution (as in the Fifth Circuit below, App., *infra*, 7a) or simply state that probable cause defeats the claim *Dahl*, 312 F.3d at 1236; *Mozzochi*, 959 F.2d at 1179. The decisions do not point to any textual, policy, or other reason why this should be so. Nor do they reconcile their holdings with this Court's holdings in *Mt. Healthy* and *Crawford-El*.[5]

Petitioner alleges that Respondent retaliated against him not only by pursuing an indictment and prosecution, but also by commencing a criminal investigation for alleged money laundering. As the court of appeals noted, a criminal investigation generally may be commenced in the absence of probable cause to believe

---

[4] Some of the dissenting Justices in *Crawford-El* would have allowed qualified immunity to a public official accused of retaliation if the official could offer a legitimate reason for the action in question and the plaintiff could not establish pretext by objective evidence. *Id.* at 602 (Rehnquist, C.J., dissenting). The Fifth Circuit's holding in this case does not allow a plaintiff to show that the official's purported reason was pretextual.

[5] The Eighth Circuit states that it applies an "objective and not a subjective standard," the very proposition rejected by the Court in *Crawford-El*. *Smithson*, 235 F.3d at 1063.

that a crime has been committed. *See* App., *infra*, 18a-19a citing *United States* v. *Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991).

Lack of probable cause thus cannot properly be an element of Petitioner's retaliatory investigation claim. It would be inappropriate to require law enforcement officers to satisfy a probable cause requirement at the outset of a criminal investigation if—but only if—the subject of the investigation subsequently alleges that the investigation was undertaken in retaliation for the exercise of First Amendment rights. But it also would be inappropriate to allow investigators to use criminal investigations as a weapon to punish individuals for exercising First Amendment rights, and chill the exercise of those rights, simply because criminal investigations generally may be commenced in the absence of probable cause. Because this case presents both the criminal investigation and the indictment contexts, and because consideration of the investigation context may shed light on the indictment and prosecution contexts, the Court may wish to grant review in this case as well as *Hartman*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in this case should be held pending the outcome of No. 04-1475, *Hartman* v. *Moore*.

Respectfully submitted,

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

July 2005

Supreme Court, U.S.
FILED
(3)
No. 04-05 64 JUL 11 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

JULY 2005

TABLE OF CONTENTS

Page

Izen v. *Catalina*, 398 F.3d 363 (5th Cir. 2005) 1a

Izen v. *Catalina*, 382 F.3d 566 (5th Cir. 2004) 12a

Izen v. *Catalina*, 251 F. Supp. 2d 1327 (S.D. Tx. 2002) 25a

Izen v. *Catalina*, 256 F.3d 324 (5th Cir. 2001) 61a

APPENDIX

REVISED JANUARY 26, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21182

JOE ALFRED IZEN, JR.; KAREN SUTER IZEN,
Plaintiffs - Appellants,

VERSUS

TERRANCE CATALINA, Special Agent, Individually;
JAMES CLIMER, Special Agent, Individually;
UNITED STATES OF AMERICA,
Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston

OPINION ON REHEARING

Before JONES, MAGILL,* and SMITH, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Joe Alfred Izen, Jr., a Texas attorney, appeals the district court's order granting summary judgment in favor of IRS agents Terrance Catalina and James Climer. Izen's Bivens action alleges that Catalina and Climer engaged in malicious prosecution and retaliation in violation of the Fourth and First Amendments, respectively, when they investigated and prosecuted him for money laundering. The district

---

* Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

court, acting on remand from this court in *Izen v. Catalina*, 256 F.3d 324 (5th Cir. 2001) ("Izen I"), granted summary judgment in favor of the agents on Izen's Fourth Amendment malicious prosecution claim on the ground that Izen did not meet the common law elements of that tort. It granted the agents' motion for summary judgment on Izen's First Amendment retaliation claim for the same reason, and held in addition that Izen had not raised a genuine issue of material fact as to the agents' retaliatory motive. The court also granted the United States' motion for summary judgment on Izen's Federal Tort Claims Act claims of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. Izen appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's grant of summary judgment as to all claims.

I.

Izen is a tax attorney. He has long represented tax protestors and other defendants in criminal tax cases. In August 1989, IRS agent Catalina received a referral from the Waco, Texas, IRS collection office alleging that Izen had not filed income tax returns for tax years 1986, 1987, and 1988. The referral contained allegations from a third party informant that Izen was involved in money laundering, including allegations that Izen was involved in the failure of a private bank and had accounts in foreign countries. Catalina soon deemed the informant unreliable. Izen alleges the informant was Michael J.B. Easton, who had an indictment pending against him at the time and, according to Izen, aided Izen's ex-wife in surreptitiously withdrawing a large sum of money from an account of Izen's.

In October 1989, Catalina accepted the referral for investigation of the charge of failure to file tax returns. He determined there was insufficient basis to investigate Izen for money laundering, but recommended opening a criminal income tax investigation for the years 1986

through 1988 based on the missing returns. Catalina also recommended including 1985 in the investigation, though a return had been filed. Catalina's tax investigation was soon derailed by the fact that Izen ultimately filed his 1986 return in September 1989, and filed his 1987 and 1988 returns in April 1990, even receiving refunds approved by Catalina.

Although Catalina dropped the income tax investigation, he then embarked on a money laundering investigation. Izen alleges that the impetus for the investigation was a desire to retaliate against him for his history of association with tax protestors, his representation of criminal tax defendants, and his representation of taxpayers utilizing foreign trusts to reduce their federal income tax. *See, e.g., United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (reversing the convictions of foreign tax shelter promoters, one of whom was represented by Izen). Izen's contention finds support in IRS investigative reports that prominently mention both Izen's association with tax protestors as well as his successful representation of tax clients. Catalina in turn alleges that the investigation was prompted by his review of various reports concerning a client of Izen's, Nassau Life Insurance Company Limited ("NLIC"), and persons and banks related to or doing business with that entity.

Upon reviewing the reports concerning Izen's client, Catalina, with the permission of his superiors, commenced an undercover investigation of Izen himself which lasted from 1990 to 1992. Climer was the undercover agent assigned to the investigation. Climer posed as a client seeking to create a foreign trust in which to deposit proceeds from the sale of purportedly stolen oil. Numerous conversations between Izen and Climer were apparently taped, though the agents have not placed any

of the recordings in the record.[1] Catalina testified before a grand jury in May 1995, and it returned a four-count indictment of Izen for conspiracy to commit money laundering and aiding or abetting or attempting money laundering. Izen alleges that the indictment was secured in part due to alleged misrepresentations made by Catalina to the grand jury.[2] In May 1996, for undisclosed reasons, the United States moved to withdraw the presentment of the indictment and all criminal charges against Izen were dismissed.

Izen brought suit in 1997, alleging various constitutional and non-constitutional torts. The district court dismissed all of Izen's claims. Izen appealed the dismissal of his Fourth Amendment malicious prosecution claim, his First Amendment retaliation claim, his Fifth Amendment claim, the denial of his motion for disclosure of grand jury materials, and the grant of summary judgment in favor of the agents based on their qualified immunity defense.

In *Izen I* we reversed the dismissal of the malicious prosecution and retaliation claims, holding that the district court had misconstrued the applicable law on both. In addition, we held that a genuine issue of material fact existed as to whether Izen was investigated and prosecuted in retaliation for representing criminal tax defendants. We affirmed the dismissal of Izen's Fifth Amendment claim as well as the denial of his motion for disclosure.

---

[1] Izen placed in the record those portions of the recordings which he argues are exculpatory.

[2] Only a small fraction of Catalina's grand jury testimony is in the record. Because of Izen's allegations, the district court did not rely on the indictment.

On remand, Izen filed a second amended complaint in which he added a Federal Tort Claims Act cause of action against the United States. The district court again granted summary judgment in favor of the agents and United States on all claims. Izen appeals the grant of summary judgment on his malicious prosecution claim, his retaliation claim, and his Federal Tort Claims Act cause of action.

II.

This court reviews a grant of summary judgment *de novo*. *Chriceol v. Phillips*, 169 F.3d 313, 315 (5th Cir. 1999). We may affirm a grant of summary judgment on grounds other than those offered by the district court. *Id.* The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If this burden is met, then the nonmoving party must set forth specific facts showing a genuine issue for trial remains. FED. R. CIV. P. 56(e).

A. Malicious Prosecution

We affirm the district court's order granting summary judgment on Izen's claim of malicious prosecution, though on different grounds. In this circuit, plaintiffs no longer allege a constitutional violation by satisfying the state law elements of malicious prosecution alone. *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc), *cert. denied* 160 L. Ed. 2d 10, 125 S. Ct. 33 (2004).[3] Because Izen's complaint does not state a

---

[3] Though the claim in *Castellano* was brought under § 1983 while Izen invokes *Bivens*, we have held that the constitutional torts authorized by each are coextensive. *Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999) ("A *Bivens* action is analogous to an action under § 1983—the only difference being that § 1983 applies to constitutional violations by state, rather (...continued)

claim under the Fourth Amendment directly, the district court properly granted the agents' motion for summary judgment.[4]

B. Federal Tort Claims Act

Izen's second amended complaint alleges claims under the Federal Tort Claims Act based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. The district court held that each of these claims failed for lack of exhaustion under 28 U.S.C. § 2675. Section 2675 provides that a would-be plaintiff must first present his claim to the appropriate federal agency. While Izen did so, the district court held that the scope of the claims stated in his second amended complaint went far beyond his administrative complaint. Because Izen has not contested this holding, we affirm.

C. First Amendment Retaliation

The Retaliation Standard

Izen alleges that Catalina launched the sting operation and prosecuted him in retaliation for his history of representing criminal tax defendants. "The First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999).[5] Subjecting an attorney to criminal

---

than federal, officials."), *overruled on other grounds by Castellano*, 352 F.3d at 948-49 & n.36. Thus, we do not distinguish here between *Bivens* claims and § 1983 claims.

[4] Further, the record does not support a claim directly under the Fourth Amendment, rendering remand fruitless.

[5] *See also Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) ("'Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith (...continued)

investigation and prosecution with the substantial motivation of dissuading him from associating with and representing clients opposing the IRS would violate the First Amendment.

In the criminal prosecution context, plaintiffs must establish three elements in order to make out a retaliation claim. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Plaintiffs must show that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Id.* This court further requires plaintiffs in the prosecution context to establish each of the common law malicious prosecution elements in addition to those three derived from the First Amendment. *Id.* at 260; *see also Johnson v. La. Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994) (same).[6] "One of these standards is an absence of probable cause to prosecute." *Keenan*, 290 F.3d at 257; *see also Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) ("An individual does not have a right under the First Amendment to be free from a criminal prosecution

---

investigation, and legal harassment, constitutes an infringement of that freedom.'") (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)).

[6] To this end, Izen's assertion that *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979) controls is incorrect. That case involved an attempt to enjoin a criminal prosecution brought with retaliatory intent. *See Id.* at 1387. Because the criminal proceedings in *Wilson* had not yet terminated, plaintiffs could not be required to prove the elements of malicious prosecution, which includes among its elements proof that the criminal action was terminated in plaintiffs' favor (*see Keenan*, 290 F.3d at 257).

supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government."). For purposes of malicious prosecution, probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999) (quoting *Moore v. McDonald*, 30 F.3d 616, 620 n.2 (5th Cir. 1994)).[7]

The district court applied the *Johnson* standard and granted summary judgment on behalf of the agents, reasoning in part that Izen had not established the common law elements of malicious prosecution. *Izen v. Catalina*, 251 F. Supp. 2d 1327, 1340-41 (S.D. Tex. 2002). In particular, the court held that Izen had not raised an issue of material fact as to whether the agents lacked probable cause to prosecute. A court determines whether probable cause existed as of the time the government

---

[7] This standard, which we share with the Second, Third, Eighth, and Eleventh Circuits, differs from that used in the Sixth, Seventh, Tenth, and D.C. Circuits. *See Moore v. Hartman*, 388 F.3d 871, 879 (D.C. Cir. 2004) (discussing the circuit split and that circuit's standard, which does not include the requirement that a plaintiff prove a lack of probable cause to succeed in a retaliatory prosecution claim); *compare Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) (requiring a plaintiff to prove the absence of probable cause to go forward on a retaliatory prosecution claim); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 796-97 (3d Cir. 2000) (same); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (same); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998) (same) *with Greene v. Barber*, 310 F.3d 889, 897-98 (6th Cir. 2002) (refusing to require proof of lack of probable cause for a retaliatory prosecution claim); *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2002) (same); *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1257 (D.C. Cir. 1987) (same).

instituted criminal proceedings. *Gordy v. Burns*, 294 F.3d 722, 728, *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d at 948-49. Although Catalina's initial information about Izen came from a potentially unreliable informant, Catalina received verifiable, independent information concerning Izen's questionable activities that amounted to probable cause before seeking an indictment.

In 1989, the IRS learned the following about Izen from the informant: (1) Izen was personally involved in the failure of the Chilton Private Bank in Chilton, Texas; (2) Izen was closely tied to Robert Chappell, the founder of NLIC, a tax shelter operating out of the Bahamas; (3) Izen engineered large transfers of money from Chilton Private Bank to offshore banks before the Chilton Private Bank failed; and (4) Izen had deposited $ 4-5 million dollars in the Isle of Man. R. 798. Additionally, the IRS learned the Izen had a great deal of knowledge about offshore banking and the working of NLIC, and he had a "close personal relationship" with Robert Chappell. R. 797. This information, coupled with Izen's failure to file tax returns for the years 1986, 1987, and 1988, led Catalina to conclude that opening a criminal investigation into Izen's affairs was warranted. The Chief Criminal Investigation officer approved this investigation. No charges were filed at this time.

Initial inquiries, including a deposition given by Izen, indicated irregularities with Izen's financial transactions for the 1985 tax year (in which he did file a tax return). Catalina, however, concedes that he was not aware that Izen eventually filed tax returns for the missing years. The returns were filed in September of 1989, after the investigation was officially opened. In any event, after Catalina's initial review of the documents indicated suspicious activity, and in light of the procedural benefits (mainly the ability to enforce summonses) afforded by a

grand jury, Catalina requested a grand jury investigation.[8] The Department of Justice approved this request. Catalina thought an undercover operation would assist in the case. Catalina's supervisor approved the operation. In early 1990, Catalina began to corroborate some of the information provided by the initial informant. Catalina learned independently that: (1) Izen had been representing NLIC since 1983; (2) the president and founder of NLIC, Robert Chappell, was a fugitive from a mail fraud conviction; (3) Chappell and his organization attracted numerous "anti-government" individuals; (4) several fugitives were apparently living and working with Chappell in the Bahamas; (5) two of the fugitives, both of whom were considered armed and dangerous, fled the country on tax charges, and were believed to be in charge of NLIC's foreign operations; (6) another NLIC executive was a fugitive on state income tax evasion charges in California; (7) NLIC used Chilton Private Bank in Chilton, Texas for some transactions; and (8) there had been over one hundred cases and thirty-one convictions numbered on taxpayers involved with NLIC. R. 791. Catalina verified an employment contract between Izen and NLIC, and that two Houston residents used Izen's office address for their Cayman Island bank accounts. Furthermore, Catalina learned that Izen: (1) attempted to establish offshore banks on numerous occasions; (2) visited several tax haven countries; (3) agreed to set up a foreign trust; (4) had a bank account in the Bahamas that he did not declare in his 1985 tax return.

---

[8] This use of a grand jury for investigative purposes is distinguished from a prosecutor's use of a grand jury to seek an indictment. *See generally* Sara Sun Beale et al., Grand Jury Law and Practice § 1.7 (2d ed. 1997). Catalina was not required to have probable cause to indict Izen when he requested the grand jury investigation.